United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7062

United States Court of Appeals

FOR THE SECOND CIRCUIT

SIDNEY DANIELSON, Regional Director, Region 2 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondent-Appellant.

On Appeal from an Order of
the United States District Court for the Southern District of New York

BRIEF FOR PETITIONER-APPELLEE

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MARCH, 1975.

UNITED STATES COURT OF APPEALS
FILED
MAR 21 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

INDEX

AUTHORITIES CITED

Statutes Involved:

Miscellaneous:

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BRIEF FOR PETITIONER-APPELLEE

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the court below committed reversible error in finding and concluding that the Board has reasonable cause to believe that MM & P violated Section 8(e) of the National Labor Relations Act, as amended, by maintaining, reaffirming, and giving effect to an agreement with Seatrain Lines, Inc. which provides, in substance, that if Seatrain should sell or transfer any of its vessels to another business entity, a condition precedent to such sale or transfer shall be the execution of the collective bargaining agreement between MM & P and Seatrain by such other business entity.

2. Whether the court below abused its discretion in concluding that injunctive relief was just and proper within the meaning of Section 10(1) of the National Labor Relations Act.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York, granting a petition for an injunction filed by petitioner-appellee Sidney Danielson, Regional Director of the Second Region (herein "the Regional Director") of the National Labor Relations Board (herein "the Board"), on behalf of the Board, pursuant to the provisions of Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. §160(1); herein the "Act"). The order of the court below was entered on December 19, 1974 (A. 30a), [1] predicated upon findings of fact and conclusions of law contained in an opinion entered by the court on December 11, 1974 (A. 22a). Notice of Appeal was filed on January 17, 1975 (A. 1a). Jurisdiction of this Court is invoked under Sections 1291 and 1292 of Title 28 of the United States Code. [2]

The petition for a Section 10(1) injunction, filed with the court below on December 2, 1974 (A. 3a), was based upon a charge filed with the Board on October 1, 1974 (A. 8a), by Seatrain Lines, Inc. (herein "Seatrain"), alleging that respondent-appellant International

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1/ "A." references are to pages of the volume entitled Joint Appendix. "Ex."references are to pages of the volume entitled Exhibits.

2/ Respondent-appellant filed a motion before this Court on January 23, 1975, to expedite this appeal. On January 29, 1975 the Court granted said motion to expedite.

Organization of Masters, Mates and Pil[illegible] AFL-CIO (herein "MM & P"), a labor organization, had engaged in and was engaging in unfair labor practices within the meaning of Section 8(e) of the Act, which Section proscribes so-called "hot cargo" agreements between a labor organization and an employer. After investigation of the charge, the Regional Director concluded that there was reasonable cause to believe that MM & P was engaging in the unfair labor practice charged and that a complaint should issue. Accordingly, the Regional Director filed the petition for injunctive relief pursuant to Section 10(1), pending final disposition by the Board of the unfair labor practice charge. 3/

The Union filed an answer which, in substance, denied that it was a "labor organization," denied that the contract clauses in question were unlawful, and denied that it had committed any unfair labor practice in light of the "work preservation" exception to Section 8(e) and additionally contended that the unfair labor practice case should have been deferred to arbitration and the Section 10(1) proceedings dismissed (A. 10a). On December 6 and 9, 1974, the court below conducted a hearing at which the Board, MM & P, and Seatrain were afforded full opportunity to, and did, present evidence and argument on the evidence and the law. The evidence adduced at the hearing and from admissions in the pleadings may be summarized as follows:

3/ A hearing before an Administrative Law Judge on the unfair labor practice charge in Board Case No. 2-CE-68 was held on January 13, 14, and 17,1975. That case is now awaiting decision of the Administrative Law Judge.

Seatrain, a Delaware corporation with an office in New York City, is engaged in the business of constructing, selling, owning, and operating seagoing vessels. Seatrain is the parent corporation of some thirty subsidiary corporations essentially grouped by Seatrain into three functional divisions concerned with the following: (1) the construction and sale of vessels, -- the division involved in the instant proceedings; (2) the carriage of containerized cargo on the high seas on vessels owned and operated by Seatrain subsidiaries; and (3) the chartering of vessels owned by Seatrain subsidiaries to other shippers who engage in "tramp" operations (A. 9-12, 56, 84, Ex. 115).

Seatrain Shipbuilding Corp. (herein "Seatrain Shipbuilding"), located in Brooklyn, New York, is a wholly owned subsidiary corporation of Seatrain, and is engaged in the business of the construction and sale of vessels. Seatrain Shipbuilding, in the course of its business, completed the construction of a supertanker called the T/T Brooklyn, and at the time of the proceedings below, had nearly completed construction of another supertanker, the T/T Williamsburg; two other vessels, not involved in the instant proceedings, are currently under construction. All of these vessels are intended for use in the oil trade (A. 12-14, 108).

Seatrain sold the Brooklyn to General Electric Credit Corporation (herein "GECC"), and obtained from GECC a commitment letter for the sale of the Williamsburg.[4/] Wilmington Trust Company acted as agent and

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4/ The actual transactions, reffered to herein as "sales", involved the following: Langfitt Shipping Corp. and Tyler Tanker Corp., both subsidiaries of Seatrain were established for the purpose of holding the construction contracts with Seatrain Shipbuilding for construction respectively of the Brooklyn and the Williamsburg. (continued)

trustee on behalf of GECC in both transactions. At the time of the above transactions no one employed by Seatrain or its subsidiaries or represented by MM & P had been assigned to work on either vessel (A. 78).

GECC entered into a bareboat charter agreement[5/] with East River Steamship Corp. for the Brooklyn, and intends to enter into a similar agreement with Kingsway Tankers, Inc. for the Williamsburg (A. 17, 20). East River Steamship and Kingsway Tankers each entered into an agreement with Anndep Corp. for management and operation of the Brooklyn and the Williamsburg, respectively (A. 19-20, 96). Westchester Marine Shipping Co., Inc. a labor contractor, has a contract with Anndep to provide the Brooklyn, and eventually the Williamsburg, with officers and crew. Westchester Marine Shipping has hired approximately 28 licensed

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4/ (continued) The transactions involved the sale or assignment to GECC by Langfitt of the latter's construction contract for the Brooklyn, and a letter of commitment from GECC to Tyler Tanker to purchase the latter's construction contract for the Williamsburg. Following completion of construction of each vessel, title was actually transferred in the case of the Brooklyn, and title will be transferred in the case of the Williamsburg, from Seatrain Shipbuilding to GECC, thus completing the sale transactions. (A. 14-15, 17-20, 25-26, 40, 59-61, 63, 66, 73-75, 99-100; Ex. 117-118).

5/ Under a bareboat charter agreement the owner, here GECC, in essence, rents the vessel as a shell to a bareboat charterer, here East River Steamship, which is responsible for maintaining the vessel in good condition until its return to the owner. The charterer obtains its own crew and supplies it with necessary provisions (A. 17-18).

deck officers for the Brooklyn pursuant to its collective bargaining agreement with the Marine Engineers Beneficial Association, District 2, and has, likewise, commenced hiring through that organization for the Williamsburg (A. 41-44, 45-53).

Neither Seatrain nor any of its corporate subsidiaries or affiliates has any corporate relation to, ownership or control over any of the other independent business entities described above (A. 20-21, 23, 78-79).

MM & P has two collective bargaining agreements[6/] with Seatrain and its affiliates and subsidiaries covering the licensed deck officers of all U.S.- flag vessels owned, operated or bareboat chartered by the Company (A. 39, 105-108; Ex. 1-76).

The Tanker Agreement, inter alia, contains the following provision (Ex. 17):

Section V. VESSELS BOUND BY THE AGREEMENT

2. Sales and Transfers

a. With regard to any sale, charter (but not including a vessel which the Company may be operating under a bareboat charter and the charter is terminated) or any manner of transfer (except sales to foreign flag) of the Company's vessel:

i. At least seventy-two (72) hours prior to the date of the effective transfer of the vessel, written notice must be given to the Organization by the Company.

ii. The execution by the purchaser, charterer or transferee of the Organization's collective bargaining agreement shall be a condition precedent to any sale, charter or transfer.

6/ These two agreements, virtually identical in their terms, are the Tanker Agreement (Ex. 1) and the Dry Cargo Agreement. The Tanker Agreement, at issue herein, is effective from June 16, 1972 through June 15, 1975 (Ex. 1).

iii. If the Company violates subsection 2(a)(ii) above, the Arbitrator may include as part of his award, loss of wages and contributions to the various Organization Plans.

iv. A violation of subsection 2(a)(ii) above shall also permit the Organization to cancel the no-strike provisions of this Agreement.

When MM & P learned that Seatrain had sold the T/T Brooklyn without complying with the provisions Section V of the Tanker Agreement, it advised Seatrain by letter dated April 17, 1974, that a grievance concerning Seatrain's alleged "failure to man the SS Brooklyn with [MM & P] Licensed Deck Officers" had been set for an arbitration hearing before the Licensed Personnel Board on April 24, 1974 (Ex. 77).

Subsequently, MM & P learned of the transaction involving the T/T Williamsburg, and, by letter dated September 18, 1974, advised Seatrain that the grievance concerning Seatrain's alleged violation of Section V of the Tanker Agreement by reason of [Seatrain's] failure to man or [Seatrain's] failure to secure the manning of the T/T Williamsburg with 10 MM & P Licensed Deck Officers", had also been set for hearing before the Licensed Personnel Board on October 30, 1974. This notice further advised that the relief sought by MM & P was the manning of the vessel with MM & P personnel and payment of the wages and benefit plan contributions which allegedly had been lost while the vessel had been, and continued to be, manned by other than MM & P personnel (Ex. 78-79).

Following receipt of the first letter, Seatrain, on April 22, 1974, filed an action in the Supreme Court of New York State seeking to enjoin MM & P from pressing its claim in arbitration. That court granted a temporary restraining order on April 23, 1974, and the action was

subsequently removed to the United States District Court for the Southern District of New York, 74 Civil 1983, wherein MM & P sought an order compelling arbitration. The court below, upon its granting of the Section 10(l) injunction in the instant case, dismissed as moot Seatrain's request for injunctive relief staying arbitration and MM & P's request for an order compelling arbitration (A. 6-7).

In the court below, the Board contended that the foregoing evidence demonstrated reasonable cause to believe that MM & P had violated Section 8(e) of the Act by maintaining and giving effect to Section V of the Tanker Agreement. Essentially, the Board contended that Section V(2)(a)(ii) of the Agreement was unlawful on its face under Section 8(e), since it conditioned the transfer or sale of any of Seatrain's vessels upon the execution, by the purchaser, of MM & P's Tanker Agreement, thereby prohibiting Seatrain from "doing business" with an employer not under contract with the Union, and thus constituted an unlawful "union signatory" agreement. The Board further contended that MM & P's demands to arbitrate Seatrain's alleged breach of Section V of the Tanker Agreement constituted a reaffirmation of, or an entering into, an agreement unlawful under Section 8(e) within the six month statute of limitations period of Section 10(b) of the Act.

The court below, based on the evidence summarized above, found and concluded that the Board had reasonable cause to believe that the Union had violated Section 8(e) by seeking arbitration of Seatrain's alleged breach of Section V of the Tanker Agreement (A. 24a). In so holding,

the court below relied primarily on this Court's decision in N.L.R.B. v. National Maritime Union, 486 F. 2d 902 (C.A. 2, 1973), enforcing 196 NLRB 1100 (1972), cert. denied 40 L. Ed. 559 (1974) (A. 24a-25a). It rejected MM & P's "work preservation" argument and concluded that insofar as the instant factual situation differed from that presented in N.L.R.B. v. National Maritime Union, supra, the instant case provided stronger grounds for rejection of the "work preservation" exception to Section 8(e) since neither vessel involved in the instant case had ever been manned by Seatrain with MM & P personnel (A. 26a-27a). The court further rejected MM & P's contentions that MM & P was not a "labor organization" and that MM & P was not the true contracting party (A. 25a-26a). Finally, the court rejected MM &P's contention that the transactions involved in the instant case did not constitute "doing business" within the meaning of Section 8(e). In this regard, the Court found that the transactions were not isolated sales of vessels previously operated by Seatrain (as had been alleged by the NMU in N.L.R.B. v. National Maritime Union, supra, 486 F. 2d at 911), but rather that the vessels were sold in the regular course of Seatrain's business through its subsidiary, Seatrain Shipbuilding,which is engaged in the business of constructing and selling vessels (A. 27a).

Accordingly, the court below enjoined the Union "pending disposition of the matters involved herein pending before the Board", from seeking arbitration or in any other manner maintaining, giving effect to, or enforcing Section V of the Tanker Agreement; or from entering into, maintaining, giving effect to, or enforcing any other contract or agreement

wherein MM & P requires Seatrain or any other person to cease or refrain or agree to cease or refrain from handling, using, selling, transporting, or otherwise dealing in the products of any other employer, or from doing business with any other person (A. 30a-31a). Although the court did not, in haec verba, expressly refer to injunctive relief as "just and proper", it did, in addition to finding reasonable cause to believe that a violation of Section 8(e) was presented, predicate its injunction order upon a finding that the charged unfair labor practices affected commerce within the meaning of Sections 2(6) and (7) of the Act and "will likely be repeated or continued unless enjoined." (A. 30a). Further, the court noted that the petition alleged that the unlawful conduct "would in effect prevent consumation of or substantially interfere with sales of Seatrain's ships (the T/T Brooklyn and T/T Williamsburg) to purchasers who have non-[MM & P] affiliation", and the injunctive relief was granted on that basis. (A. 23a).

On this appeal, the Board will demonstrate that the court below was warranted in finding that the Board had reasonable cause to believe that MM & P is a statutory "labor organization"; that the Union was violating Section 8(e) of the Act; that the "work preservation" exception is inapplicable to the facts of the instant case; that the court was warranted in concluding that injunctive relief was just and proper; and therefore, that the order should be affirmed.

ARGUMENT

I. PRELIMINARY STATEMENT: THE STATUTORY SCHEME PURSUANT TO WHICH THE PROCEEDINGS WERE INITIATED IN THE COURT BELOW; AND THE APPLICABLE STANDARDS FOR INJUNCTIVE RELIEF IN A SECTION 10(1) PROCEEDING WITHIN THE STATUTORY SCHEME

Section 10(1) of the Act [7/] embodies the determination of Congress that certain unfair labor practices give, or tend to give rise, to such serious interruptions to commerce as to require their discontinuance pending adjudication by the Board, to avoid irreparable injury to the policies of the Act and the frustration of the statutory purpose which otherwise would result (S. Rep. No. 105, 80th Cong. 1st Sess., pp. 8, 27; I Leg. Hist. LMRA 414, 433). In that section, therefore, Congress imposed a mandatory duty upon the Board's officer or regional attorney to whom the matter is referred to seek appropriate injunctive

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7/ Section 10(1) of the Act, in pertinent part provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of Section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: . . . Upon filing of any such petition the

(Continued)

relief in a district court upon a reasonable belief that a violation has occurred and empowered the court petitioned to grant the injunctive relief deemed "just and proper."[8/] As explained in the Senate Report on the bill which became the Act (Ibid):

> . . . Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the Committee is convinced that additional procedures must be made available under the National Labor Relations Act in order to adequately protect the public welfare which is inextricably involved in labor disputes.
>
> Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by the enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives -- the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining, Hence, we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek relief in the case of strikes and boycotts defined as unfair labor practices. . . .

7/ (Continued)
courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: . . . .

8/ Section 10(j) of the Act empowers the Board to seek injunctive relief in the case of all other types of unfair labor practices not covered by Section 10(l).

It is settled that in a proceeding under Section 10(l) of the Act, the district court is not called upon to decide the merits of the unfair labor practice case, i.e., whether, in fact, a violation has occurred; the ultimate determination of this question, with respect to issues of fact and issues of law, is reserved exclusively for the Board, subject to review by the court of appeals pursuant to Sections 10(e) and (f) of the Act. N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 681-683 (1951). The inquiry of the district court is limited to whether the Board has reasonable cause to believe that the respondent was violating the Act as charged;[9/] if it so concludes, it should grant such relief as it deems just and proper.

With respect to factual issues ". . . [t]he evidence need not establish a violation. It is sufficient . . . if there be any evidence which together with all the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe that a violation has occurred." Madden v. Hod Carriers', Local 41, 277 F. 2d 688, 692 (C.A. 7, 1960), cert. denied 364 U.S. 863. Accord: Douds v. Milk Drivers and Dairy Employees Union, 248 F. 2d 534, 537 (C.A. 2, 1957); Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union, 494 F. 2d 1230, 1245 (C.A. 2, 1974); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F. 2d 541, 546 (C.A. 9, 1969).

9/ The reasonable cause to believe test applies as well to "labor organization" status under the Act. International Organization of Masters, Mates and Pilots, 259 F. 2d 312, 313 (C.A. 7, 1958), cert. denied 358 U.S. 909.

With respect to legal issues, this Court has held that "the district court should be hospitable to the views of the General Counsel, "however novel" (Danielson v. Joint Board, supra), for "the Board, rather than the district courts, remains the 'primary fact finder' and 'primary interpreter of the statutory scheme,' subject to judicial review by a court of appeals pursuant to Sections 10(e) and (f) [of the Act]." McLeod v. National Maritime Union, 457 F. 2d 490, 494 (C.A. 2, 1972); and McLeod v. Local 25, Electrical Workers, 344 F. 2d 634, 638 (C.A. 2, 1965); citing Schauffler v. Local 1291, International Longshoremen's Association, 292 F. 2d 182, 187 (C.A. 3, 1961). Although in Danielson v. Joint Board, supra, this Court, in disagreement with other courts of appeals (494 F. 2d at 1244-45) held that a district court should deny injunctive relief "when after full study, the district court is convinced that the General Counsel's legal position is wrong," prior decisions of this Court make clear that judicial decisions which are adverse to the Board's position, or disagreement by the district court with that position, do not alone negate "reasonable cause." Douds v. Milk Drivers and Dairy Employees Union, supra, 248 F. 2d at 538; McLeod v. Local 282, Teamsters, 345 F. 2d at 145; McLeod v. National Maritime Union, supra, 457 F. 2d at 1133 (Section 10(1) proceeding involving arbitration of a - "union signatory" clause, in which this Court reversed the denial of an injunction); Kaynard v. Independent Routemen's Association, 479 F. 2d 1070 (C.A. 2, 1973); McLeod v. A.F.T.R.A., 234 F. Supp. 832, 838 (S.D.N.Y., 1964), aff'd. 351 F. 2d 310 (C.A. 2, 1965) (Section 10(1) proceeding involving arbitration of a "union standards" - "union signatory"

clause). See also McLeod v. Sheet Metal Workers Local 28, 334 F. Supp. 1098, 1100 (S.D.N.Y., 1971); McLeod v. Security Guards and Watchmen Union, 333 F. Supp. 768, 770-771 (S.D.N.Y., 1971); McLeod v. Local 32E Building Service Employees Union, 227 F. Supp. 242, 245-246 (S.D.N.Y., 1964).

II. THE COURT BELOW PROPERLY FOUND REASONABLE CAUSE TO BELIEVE THAT THE UNION'S INVOCATION OF SECTION V OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN MM & P AND SEATRAIN VIOLATED SECTION 8(e) OF THE ACT

A. The Applicable Principles of Law

Section 8(e) of the Act, enacted as part of the 1959 Landrum-Griffin amendments, provides in pertinent part that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: . . .

As the Supreme Court explained in National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 633-634 (1967), Section 8(e) was designed to implement and reinforce the existing proscriptions against secondary boycotts contained in Section 8(b)(4) of the Act.[10/] These

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10/ Section 8(b)(4)(B), the secondary boycott provision of the Act, makes it an unfair labor practice for a union:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object there is: . . . (E) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

proscriptions were designed to limit the area of industrial dispute in order to confine its effects to the parties immediately concerned, and to prevent its extension to employers and employees not directly involved; they were aimed at "shielding unoffending employers and others from pressures in controversies not their own." N.L.R.B. v. Denver Bldg. & Constr. Trades Council, supra, 341 U.S. at 692. However, in the interval between the passage of the Taft-Hartley Act and the 1959 amendments, labor organizations resorted to tactics to circumvent the secondary boycott proscriptions by successfully exacting from employers so-called "hot cargo" agreements under which the employers relinquished their freedom to do business with or handle or provide goods and services for or to employers with which the contracting union had a dispute or for some reason the Union considered unfair.[11/] Employing Lithographers of Greater Miami v. N.L.R.B., 301 F. 2d 20, 27 (C.A. 5, 1962). The Supreme Court in Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93, 108 (1958), held that such agreements were not illegal, pointing out that under the then existing secondary boycott provisions contained in Section 8(b)(4), the legal prohibition was directed not

11/ See, e.g., the analysis of the secondary boycott and "hot cargo" provisions in the 1959 amendments by the then Senator Kennedy and Congressman Thompson, 105 Cong. Rec. 16589, I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (Gov't. Print. Office 1959) 1707-1709.

at any contractual agreement entered into on the part of the employer, but only at union inducement of employees to refuse to handle goods.[12/]

Cognizant of this "major weakness in the law against secondary boycotts" (II Leg. Hist. (1959) 1708), Congress in the 1959 amendments, undertaking to close the "loopholes" which permitted labor organizations to circumvent these boycott provisions, added Section 8(e) to the Act. Section 8(e), in sum, makes unlawful an express or implied contract or agreement between an employer and a union whereby, and to the extent, an employer agrees to boycott, in its business relations, any other firm or person.

Thus, Sections 8(b)(4)(B) and 8(e) complement each other, with the former prohibiting union action or conduct with an object of achieving a secondary boycott and the latter, in effect, banning secondary boycott agreements. In the developing interpretation of the law, it has become evident that not every agreement which on its face would seem to require an employer to refrain from doing business with another employer necessarily is intended to boycott the other employer within the meaning of Section 8(e); an inquiry must be made to determine if the object of the union's conduct or agreement is "primary", that is, related solely to the employees in the bargaining unit of the employer party to the agreement or "secondary", that is, related in part at least to employees of other employers, employees not within the bargaining unit covered by the

12/ Although the Supreme Court held that the execution of hot cargo agreements and voluntary compliance therewith by the employer were lawful, it also held that the inducement of employees to strike or refuse to handle "hot goods" with the object of forcing employers to abide by the hot cargo agreements, was unlawful. Such hot cargo agreements, the Court held, did not constitute a defense to the secondary boycott provisions. Local 1976, supra, 357 U.S. at 105.

agreement in question. If the sole object is "primary" then it falls outside the proscriptions of the Act. The test for making this determination, as stated by the Supreme Court in National Woodwork, supra, 386 U.S. at 644-645 is:

> . . . Whether, under all the surrounding circumstances, the Union's objective was preservation of work for the [contracting employer's] employees or whether the agreements [or] boycott were tactically calculated to satisfy union objectives elsewhere . . . There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees of the primary employer, thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees [footnotes omitted].

Under these principles, an agreement that entirely prohibits subcontracting any work performed by the bargaining unit, although it might come within a literal construction of the ban established by Section 8(e), is nonetheless lawful because of the valid purpose it serves in protecting the job opportunities of the employees in the immediate bargaining unit. Similarly, absent unusual circumstances, an agreement that limits subcontracting to employers maintaining working conditions equivalent to those in the bargaining unit, but without requiring the subcontractor to be a party to the union's contract, is lawful because it serves the primary objective of protecting work standards in the unit by removing the economic incentive for contracting out, thereby preserving the work of the unit employees. See N.L.R.B. v. National Maritime Union, supra, 486 F. 2d at 912-913; and see Retail Clerks, Local 1288 (Mead's Market), 163 NLRB 817, 818-819 (1967), enf'd. 390 F. 2d 858, 861 (C.A.D.C., 1968), and cases cited therein.

On the other hand, clauses which permit the contracting employer to subcontract unit work or to sell or transfer all or part of its operations only to employers who recognize or deal with the union or who are signatory to a contract with it are violative of Section 8(e).[13/] Such clauses are deemed secondary since, as this Court has stated, "If the clause is a union signatory clause, the union has an interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units." N.L.R.B. v. National Maritime Union, supra, 486 F. 2d at 913. See also N.L.R.B. v. Joint Council of Teamsters No. 38, 338 F. 2d 23, 28 (C.A. 9, 1964); District No. 9, Machinists v. N.L.R.B., 315 F. 2d 33, 36-37 (C.A.D.C., 1962); Meat & Highway Drivers, Local 710 v. N.L.R.B., 335 F. 2d 709, 717 (C.A.D.C., 1964); Truck Drivers Union, Local No. 413 v. N.L.R.B., 334 F. 2d 539, 548 (C.A.D.C., 1964), cert. denied 379 U.S. 916; Retail Clerks, Local 1285, supra, 163 NLRB at 819. For "to make the selection of subcontractors turn upon union approval bears only a tenuous relation to the legitimate economic concerns of the employees in the unit, and enables the union to use secondary pressure in its dispute with the subcontractors" Meat & Highway Drivers, supra. Insofar as such clauses are designed to protect

13/ The phrase "cease doing business" in Section 8(e) applies not only to subcontracting, but also to the sale or transfer, as here, of a newly constructed vessel which had never been operated by the company which built it. Compare National Maritime Union, 196 NLRB at 1100-1101, enf. 486 F. 2d 902, 911. See Milk Drivers and Dairy Employees, Local 537 (Sealtest Foods), 147 NLRB 230 (1964), (involving the sale of milk distribution routes) and see Retail Fruit & Vegetable Clerks v. N.L.R.B., 249 F. 2d 591, 595 (C.A. 9, 1957), quoting I.B.E.W. Local 501 v. N.L.R.B., 181 F. 2d 34, 37 (C.A. 2, 1950), aff'd. 341 U.S. 694. Here, as shown supra, p. 9 , the court below found that based on the evidence, Seatrain is engaged in the business of constructing and selling vessels.

the job opportunities or wages of union members generally, rather than those of the unit employees, the clauses are unlawful. Meat & Highway Drivers v. N.L.R.B., supra, 335 F. 2d at 716; Orange Belt District Council of Painters No. 48 v. N.L.R.B., 328 F. 2d 534, 538 (C.A.D.C., 1964); International Union, United Mine Workers of America (Bituminous Coal Operators), 165 NLRB 467 (1967), remanded on other grounds, 399 F. 2d 977 (C.A.D.C, 1968).[14/]

B. The evidence adduced below demonstrated at least reasonable cause to believe that the clause in question is secondary in thrust and therefore unlawful.

Applying the foregoing principles and authorities to the instant case, it is clear that work preservation is not the sole object that a direct and stated object of Section V of the [illegible] Agreement between MM & P and Seatrain is to condition the sale or transfer of vessels upon acceptance by the purchaser of the MM & P agreement, thereby rendering the clause invalid on its face under Section 8(e). Thus, Section V(2)(a)(ii) requires that "The execution by the purchaser, charterer or transferee of the Organization's collective bargaining agreement shall be a condition precedent to any sale, charter or transfer", a clear and unambiguous unlawful union signatory condition or secondary restriction on the "doing of business" by Seatrain and its subsidiaries.

14/ The decisions in Orange Belt and in N.L.R.B. v. Joint Council of Teamsters, supra, 338 F. 2d 23, were cited with approval by the Supreme Court in National Woodwork Manufacturers Ass'n. v. N.L.R.B., supra, 386 U.S. at 645, n. 40.

By setting up a condition that business may be done only with union operators, the clause reaches out beyond the preservation of unit work (in this case, work performed by the employees of Seatrain), and seeks to regulate employment conditions elsewhere (those of prospective purchasers of vessels from Seatrain).[15/]

MM & P nevertheless contends that its objective was privileged by the work preservation exception to Section 8(e). We submit that in light of this Court's decision in N.L.R.B. v. National Maritime Union, supra, the facts of the instant case present an even stronger basis for finding inapplicable the work preservation concept. Thus, in the latter case, unlike here, the ship which was sold had been manned by NMU personnel. This Court nevertheless rejected the contention, which is also made here, that the relevant work unit encompassed all individuals seeking to obtain work through the organization's hiring hall. In so doing, this Court acknowledged that it was the practice in the shipping industry for the purchaser's union to man newly-acquired vessels and that this practice was in accord with the fleet-wide unit normally found appropriate by the Board in the shipping industry, 486 F. 2d at 913 ; see Moore-McCormack Lines, Inc., 139 NLRB 796, 798-99 (1962). This Court additionally noted that it was the NMU's practice to remove all seamen from a ship whenever the ship is sold and to then refer seamen through the hiring hall based on seniority, 486 F. 2d at 914 . Although the MM & P Tanker Agreement in the instant case does not appear to contain the same requirement, it does

15/ The Board does not contend that the portion of the arbitration proceeding seeking to determine whether the present owners, charterers, or operators of the vessels are Seatrain affiliates or subsidiaries (an issue that does not even arise under Section V), is in any way unlawful.

provide that employment in a particular vessel is limited to 180 day tours on a rotational basis; hiring through the hall is dependent upon length of time on the unemployed list for all MM & P members in good standing, and purchasers may always request new masters and chief officers. Thus, it is clear that MM & P seeks to preserve work for a broad group of individuals (i.e. MM & P members generally) which includes individuals who have never been employed by Seatrain. The Court in National Maritime Union rejected an NMU contention, in essence, the same made by MM & P herein, that since the Board has assumed, without deciding, that the bargaining unit for Commerce employees could include seamen who might in the future be referred to Commerce from the NMU hiring hall, the "preservable work unit" necessarily included all potential NMU hiring hall referrants. The Court stated:

> We cannot accept this argument. While the cases may use the bargaining unit as a yardstick for the permissible scope of a work preservation clause, we are aware of none that do so where, as here, the suggested bargaining unit is many times larger than the actual work force of the primary employer and where the vast majority of the workers in the supposed unit have had no contact at all with the employer. (486 F. 2d at 914).

Here, it is submitted there is no reason for this Court, in testing for reasonable cause, to reverse itself and now conclude that the relevant work unit contains all potential applicants who use the MM & P hiring hall. However, even assuming that a more limited and identifiable group of referrants having a nexus with Seatrain were ascertainable, MM & P's argument that the work on the T/T Brooklyn and the T/T Williamsburg should somehow be viewed as an exchange for work lost on vessels traded in by Seatrain to the Maritime Administration,

is not essentially different from the NMU's contention, rejected by this Court in National Maritime Union, that the NMU was "merely attempting to avoid erosion of its place in a dying industry." 486 F. 2d at 913. Finally, as in National Maritime Union, the vessels are now manned or scheduled to be manned by a rival union, here MEBA, District 2, so that there is a high likelihood that an inter-union conflict will develop absent injunctive relief.

For all of the above reasons we submit that the court below was warranted in concluding that reasonable cause existed to believe that Section V of MM & P's contract with Seatrain cannot be regarded as a privileged work preservation clause.

Tacitly recognizing the weakness of its position on the issue of reasonable cause, MM & P in its brief uses a shotgun approach, in attempting to negate the showing of reasonable cause by asserting a variety of defenses. These will be dealt with seriatim.

First, MM & P contends (Br. pp. 5-6) that, at least for the purposes of this case, it is not a "labor organization" within the meaning of Sections 2(5), 8(e), and 10(l) of the Act. We submit that the court below was fully warranted in finding reasonable cause to believe that MM & P is a "labor organization" in light of the fact that MM & P clearly admits to membership "employees" within the meaning of Section 2(3) of the Act and in light of pertinent court and Board authority finding MM & P to be a "labor organization." See International Organization of Masters, Mates and Pilots, AFL-CIO v. N.L.R.B., 486 F. 2d 1271 (C.A.D.C., 1973) rehearing den. 486 F. 2d 1271, cert. den. _____ U.S. _____, 40 L. Ed. 2d 306, 85 LRRM 3018 (1974); National Maritime

Engineers Beneficial Association (S & S Towing Co.), 274 F. 2d 167 (C.A. 2, 1960); International Organization of Masters, Mates and Pilots, AFL-CIO, 144 NLRB 1172, 1177, enf'd. 351 F. 2d 777 (C.A.D.C., 1965); and the recent Administrative Law Judge's decision in Westchester Marine Shipping Co., ALJD 13-75, Case Nos. 15-CB-1474, 1475, January 22, 1975.

Nevertheless, MM & P argues (Br. pp. 38-45) that only its Offshore Division, all of whose members assertedly work as supervisory licensed deck officers, is involved in the instant case. However, the evidence before the court below demonstrates the MM & P itself is the union party to the Tanker Agreement with Seatrain and that it is MM & P that is responsible for the unfair labor practices in this case. Thus, the Tanker Agreement on its face reveals that the agreement is made by MM & P itself and is signed on its behalf by its President (Ex. 76). Further, the demands for arbitration were set forth on MM & P stationery by MM & P's Secretary-Treasurer and Contract Enforcement Officer (Ex. 77-79). However, even assuming, arguendo, that MM & P's efforts were made solely on behalf of its Offshore Division and that the particular contract involved herein, the Tanker Agreement with Seatrain, covers only Section 2(11) "supervisors", the fact remains that the conduct which is the subject of this proceeding was engaged in by MM & P and that MM & P, for the reasons discussed above is a "labor organization" within the meaning of the Act. See International Organization of Masters, Mates and Pilots, AFL-CIO, supra, 486 F. 2d at 1273-1274; National Maritime Engineers Beneficial Association (S & S Towing), supra, 274 F. 2d at 173; Westchester Marine Shipping Co., supra, ALJD 13-75 slip opinion at pages 23-31.

MM & P makes a related argument to the effect that Seatrain should not be regarded as an "employer" for purposes of Section 8(e) because the Seatrain employees represented by MM & P are supervisors within the meaning of Section 2(11) of the Act and that Section 8(e) applies only to agreements between "employers" and labor organizations. This argument must also fail because (1) Seatrain which employs statutory "employees", is clearly an "employer" within the meaning of the Act regardless of whether MM & P represents only its non-statutory employees and (2) in any event, while the literal language of Section 8(e) refers to "employers" and labor organizations entering into hot cargo agreements, the legislative history is clear that Congress intended Section 8(e) to have a broader application. Marriott Corp. v. N.L.R.B., 491 F. 2d 367 (C.A. 9, 1974), enforcing 197 NLRB 232 (1972) (collective bargaining agreement with an airline employer subject to the Railway Labor Act and clearly not an "employer" under the NLRA nevertheless held subject to the requirements of Section 8(e)).

Next, MM & P (Br. pp. 19-20) asserts that attack of the clause is barred by the six-month statute of limitations imposed by Section 10(b).[16/] This argument is again of no avail to MM & P. Although the contract was entered into by MM & P and Seatrain more than six months prior to the filing of the charge, the clause in question is invalid on its face (supra, pp.21-22) and was reaffirmed, or given effect by the demands for

16/ Section 10(b) of the Act provides in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . "

arbitration in April and September, 1974 -- a time within the Section 10(b) period. Thus, the fact that an unlawful clause had initially been entered into by the parties at a time outside of the Section 10(b) period would not be a bar to establishing a violation where, as here, one party has unilaterally reaffirmed or given effect to the unlawful clause within the Section 10(b) period to achieve a secondary objective. Such reaffirmation is deemed to constitute an unlawful "entering into" within the meaning of Section 8(e). See Dan McKinney Co., 137 NLRB 649, 654 (1962) (employer voluntarily giving effect to an unlawful clause); Local 585, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (Falstaff Brewing Co.), 144 NLRB 100, 105 (1963) (union demanding arbitration of an employer's alleged breach of the unlawful clause).[17/] In N.L.R.B. v. Local Union No. 28, Sheetmetal Workers International Association, AFL-CIO, 380 F. 2d 827 (C.A. 2, 1967), relied upon by MM & P, this Court found no violation of Section 8(e) in a situation where a Union, within the Section 10(b) period, had unilaterally invoked a face-invalid union signatory clause which had initially been entered into beyond the Section 10(b) period.

17/ For cases where both of the contracting parties had, within the Section 10(b) period, reaffirmed or given effect to the unlawful clause see N.L.R.B. v. National Maritime Union, supra, 486 F. 2d at 912-913; Balicer v. International Longshoremen's Association (Twin Express, Inc.) ___ F. Supp. ____, (D. N.J., 1974), 86 LRRM 2554, 2564 Kennedy v. Sheet Metal Workers, Local 108, 289 F. Supp. 65, 82(D. Cen. Calif., 1968).

Local Union No. 28 is distinguishable on the ground that the clause in issue in that case was invoked by the Union purely for a work preservation purpose. In contrast, here, to the extent that the MM & P's resort to arbitration is aimed not at preserving work for members of the unit represented by MM & P, but at restraining Seatrain from doing business with another person who has not agreed to be bound by the Tanker Agreement, MM & P seeks to achieve a secondary objective. Thus, as shown, the work at issue herein, the manning of the vessels the T/T Brooklyn and the T/T Williamsburg, admittedly had never been assigned to, or performed by MM & P personnel employed by Seatrain or its subsidiaries (A. 78). Further, the vessels were subsequently manned, or scheduled to be manned by the purchaser with personnel obtained pursuant to a collective bargaining agreement which the labor contractor had with an MM & P rival, MEBA District 2. Finally, MM & P sought to arbitrate Seatrain's alleged failure to man the vessels, and, as part of the arbitral relief, sought an award requiring the manning of the vessels with MM & P personnel and the payment by Seatrain of wages and fringe benefits lost while the vessels were not so manned. We submit that the above facts demonstrate that the court below was warranted in concluding that the Board had reasonable cause to believe that MM & P's object in invoking Section V of the Tanker Agreement was secondary, and that the attempted enforcement of the clause through arbitration, constituted in the circumstances an "entering into", within the Section 10(b) period, of a clause prohibited by Section 8(e).

It is also submitted that Associated General Contractors of California, Inc., 207 NLRB No. 58 (1973) and Kimstock Division, Tridair Industries, Inc., 207 NLRB No. 59 (1973), on which MM & P relies in support of its contention that the Board would not find the instant resort to arbitration unlawful, are clearly inapposite. The instant case involves a contract clause unlawful on its face under Section 8(e) which, because it was initially entered into beyond the Section 10(b) period, must be shown to have been reaffirmed or given effect within the Section 10(b) period. And MM & P's resort to arbitration to enforce the clause constituted such reaffirmation. A finding that the clause is proscribed by Section 8(e) is in no way dependent upon a showing that resort to arbitration also constituted coercive conduct within the meaning of Section 8(b)(4)(ii)(B) of the Act, as was the case in Associated General Contractors and Kimstock Division, supra. In each of those cases the clause at issue was a restriction on subcontracting of work at the site of construction. The clause was, therefore, lawful on its face by virtue of the construction industry proviso to Section 8(e) unless it were found to contain "self-help" provisions sufficient to remove it from the protection of the proviso. Compare Ets-Hokin Corp., 154 NLRB 839, 842 (1965) enf'd. sub nom. N.L.R.B. v. I.B.E.W., Local 769, 405 F. 2d 159 (C.A. 9, 1968), cert. denied 395 U.S. 921. Finding that resort to arbitration would not constitute 8(b)(4)(ii) conduct, the Board concluded in the cited cases that a further provision in the contract permitting the Union to seek, through arbitration, the assessment of damages for a breach of the subcontracting clause would not amount to a "self-help"

provision sufficient to take the clause out of the protection of the proviso. Whether resort to arbitration constituted Section 8(b)(4)(ii) conduct was further necessary to a disposition of the AGC & Kimstock cases since the complaintalso contained a Section 8(b)(4)(ii)(B) allegation based on such conduct. Having ooncluded that the Union's conduct did not onstitute "restraint or coercion" within Section 8(b)(4)(ii), no violation of Section 8(b)(4)(B) was found. In the instant case no contention is made, nor is it necessary for a finding of a Section 8(e) violation to show that MM & P engaged in Section 8(b)(4)(ii) conduct. Resort to arbitration is not relied upon here to attempt to show that MM & P engaged in Section 8(b)(4)(ii) conduct, but merely as the evidence establishing that the face invalid contract executed outside of the 10(b) period has been reaffirmed or re-entered into within the 10(b) period. 18/

Finally, MM & P contends that the unfair labor practice should have been deferred to arbitration and the Section 10(1) proceedings dismissed. This contention is discussed in the next section, infra.

18/ Although MM & P in its brief also cites Griffith Company, et al., 212 NLRB No. 4 (1974), and Merle Riphagen, 212 NLRB No. 5 (1974), in support of its position, no discernable connection appears to exist between these Board decisions and the instant case, and MM & P's Brief is silent as to the relevance of these decisions. Both cases alleged violations of Sections 8(b)(4)(B) and 8(e). Griffith involved an agreement between a union and various employers in the construction industry which the Board found was designed to ensure the viability of certain fringe benefit funds by, in effect, requiring signatory employers to agree to cease doing business with other employers delinquent in their contributions to the same funds. Because of the special circumstances in the case, the Board found the agreement and its enforcement to be primary in nature, and thus not violative of the Act. In Merle Riphagen, supra, which involved enforcement of a similar "guarantor" provision, the Board found the general contractor and the delinquent subcontractor involved were a joint business venture, and thus not entitled to the protections afforded a "neutral" under Section 8(b)(4)(B) and 8(e). These decisions are inapposite.

III. THE BOARD WAS NOT REQUIRED TO DEFER THE UNFAIR LABOR PRACTICE TO ARBITRATION AND THE COURT, THEREFORE, SHOULD NOT DISMISS THE SECTION 10(1) PROCEEDINGS

On this appeal, MM & P contends that since this case essentially involves a contract dispute, the unfair labor practice proceedings should have been deferred to arbitration pursuant to the Board's decision in Collyer Insulated Wire, 192 NLRB 837 (1971), and the Section 10(1) proceedings should have been dismissed by the court below. We submit that this contention is without merit for the following reasons. First, since the issue to be decided by the arbitrator (whether Seatrain breached Section V of its collective bargaining agreement with MM & P), does not coincide with the statutory issues to be decided by the Board, i.e., whether the unambiguous clause itself is violative of Section 8(e), whether resort to arbitration to seek enforcement of the clause constituted an "entering into" of an unlawful agreement within the Section 10(b) period, and whether MM & P is a "labor organization" within the meaning of Sections 2(5), 8(e) and 10(1) of the Act, deferral to arbitration would be inappropriate. See National Maritime Union supra, 196 NLRB at 1100, note 4, enf. 486 F.2d 907, (where the Board, following arbitration, refused to defer to the award of the arbitrator since it "dealt

19/ Not presented in this case is the issue of whether the Board should first allow an arbitrator to determine the parties' intention with respect to an ambiguous clause because of the possibility that the arbitrator may find that the parties had agreed to a clause which is lawful under the Act. Even in such circumstances, however, the Board would retain jurisdiction to determine, under its policy for review of arbitration awards (Spielberg Manufacturing Co., 112 NLRB 1080 (1955)), whether the proceedings had been fair and regular, and (Cont'd)

solely with the interpretation of the contract and did not consider the unfair labor practice issue . . .")and George Koch Sons, Inc., 199 NLRB 166, 168 (1972). The Board's decision in Electronic Reproduction Service Corp., 213 NLRB No. 110 (1974), relied upon by MM & P (Br. p. 32), does not suggest that initial deferral to arbitration would be appropriate even though the issue to be presented to the arbitrator does not coincide with the statutory issues. Rather, that decision requires that in cases which are appropriate for initial deferral, i.e., where the contract issue and the statutory issue do coincide (as in cases arising under Section 8(a)(3) involving discharges for "just cause"), the party seeking to avoid the arbitral award shall have the burden of insuring that the statutory issue is presented to, or considered by, the arbitrator; and if the statutory issue was or could have been presented to the arbitrator and he nevertheless failed to discuss the issue in his award, the Board, with limited exceptions would defer to the award.

19/ (Cont'd) whether the award was repugnant to the purposes and policies of the Act. Collyer Insulated Wire, supra, 192 NLRB at 843. Further, where the arbitrator, in his award, has refused to pass upon the statutory issue, even though it had been presented to him, the Board will not defer to the award, but will proceed to determine the case on the merits. Radioear Corp., 214 NLRB No. 33 (1974) (review of award under Board's retained jurisdiction where case had initially been deferred under Collyer).

Second, the Board would not defer to an arbitration award where the award was the conduct which gave rise to the Section 8(e) violation found in that case. See Bigge Drayage Co., 197 NLRB 281 (1972). Chairman Miller's concurring opinion at 282, note 2, states in part as follows: "As an interpretation of the /Section 8(e)/ agreement, the award was a part thereof. Far from resolving an unfair labor practice issue, the determination gave rise to the unfair labor practice. In these circumstances, the joint panel proceeding can in no sense be regarded as an alternative forum for resolving issues appropriate for Board determination." See also McLeod v. A.F.T.R.A. (Westinghouse Broadcasting Corp.), 234 F. Supp. 832, 840-842 (S.D.N.Y., 1964), aff'd. 351 F.2d 310 (C.A. 2, 1965). Here, since resort to the arbitration proceedings of the contract is what gave rise to a "reentering into" of the agreement and to the violation of Section 8(e), deferral to arbitration would clearly be inappropriate.

Third, deferral to arbitration would not be appropriate where all parties whose interests are at stake in the unfair labor practice determination are not signatories to the agreement and hence where their interests would not be represented in the arbitration proceeding. Thus, neither the purchaser, nor any of the other companies responsible for operating or manning the vessels are parties to the Tanker Agreement or bound under the arbitration proceedings. See White Front San Francisco, Inc., 203 NLRB No. 79, at slip opinion note 2 (1973); Bigge Drayage Co., supra, 197 NLRB at 286-87. 20/

20/ The Supreme Court's decision in William E. Arnold v. Carpenters, _____ U.S. _____, 40 L. Ed. 2d 620 (1974), relied upon by MM & P (cont'd)

Fourth, assuming arguendo, that Collyer is applicable and that deferral to arbitration is warranted in this case, it does not necessarily follow that the Board would thereby be precluded from seeking interim injunctive relief under Section 10(1) pending final Board disposition of the case, including Board consideration of the arbitration proceeding.[21] This is particularly so in light of the strong public policy favoring such relief (Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964); McLeod v. A.F.T.R.A. (Westinghouse Broadcasting Co.), supra, 234 F. Supp. at 840-842, aff'd. 351 F.2d 310), and the fact that Section 10(1) of the Act mandates that an injunction be sought whenever reasonable cause exists to believe that a violation of Section 8(e) has been committed. As the Court of Appeals for the Seventh Circuit has most recently stated: Squillacote v. Graphic Arts International Union, Local 277, ___ F.2d ____ (C.A. 7, March 17, 1975) (at slip opinion p. 10):[22]

20/ (Cont'd) does not hold to the contrary. Indeed, the Supreme Court has held (N.L.R.B. v. Plasterers Local 179, 404 U.S. 146 (1972)) that it is inappropriate for the Board to defer an arguable Section 8(b)(4)(D) "jurisdictional dispute" to the parties' "agreed upon methods for the voluntary adjustment of . . . the dispute" under Section 10(k) of the Act, unless all affected parties are participants bound by such procedures. See also Continental Can Co., 202 NLRB No. 78 (1973); Binswanger Glass Co., 207 NLRB No. 56 (1973), where the Board refused to defer jurisdictional disputes to arbitration because not all parties were bound.

21/ See Collyer, supra, 192 NLRB at 843.

22/ Copies of this decision have been provided for the convenience of the Court.

> If the district court finds that the Board has reasonable cause to believe GAIU 277 is carrying on a secondary boycott, an injunction must issue. Section 10(1) provides interim relief pending the final disposition of a case. Whether the labor dispute is resolved either through arbitration or finally adjudicated by the Board is unimportant. The paramount concern is the need to maintain the status quo. Labor disputes are better resolved by arbitration award or Board order. These procedures, however, take time. A secondary boycott may achieve its unlawful objective before the Board or an arbitrator can hear and dispose of the case. Section 10(1) provides the means to freeze the dispute before it is too late. Then with time, the better resolution, one by law and agreement, can be brought about. Carpenters Local 1976 v. N.L.R.B., 357 U.S. 93 (1958); Penello v. Longshoremen Local 1248, 455 F.2d 942 (4th Cir., 1971); N.L.R.B. v. Longshoremen Local 1248, 331 F.2d 712 (3d Cir., 1964).

Neither William E. Arnold Co., supra, nor this Court's decision in United Optical Workers v. Sterling Optical Co., 500 F.2d 220 (C.A. 2, 1974), relied upon by MM & P, suggests that the Board would be required to defer to arbitration. Both cases arose under Section 301 of the Act involving no unfair labor practice charge before the Board. Sterling Optical held merely that where a contract violation and an arguable statutory violation are presented, as between the courts and the arbitral forum, the latter should be given preference by the courts to make the initial determination on the merits of the dispute. However, such is not the case where an unfair labor practice charge has been filed and the Board's processes become involved. Carey v. Westinghouse Electric Corp., supra; McLeod v. A.F.T.R.A., supra.

In addition to approving the Board's Collyer doctrine, Arnold merely reaffirmed the proposition that concurrent jurisdiction exists between the Board and the courts where the activity in question is arguably both an unfair labor practice and a breach of contract. If Arnold has any other bearing, it is that deferral would be inappropriate here. In discussing deferral to arbitration, the Supreme Court stated: "The assurance of swift and effective judicial relief provides incentive to eschew economic weapons in favor of binding grievance procedures and no strike clauses." 40 L. Ed. at 626 (Emphasis supplied). In the instant case, Section V of the Tanker Agreement provides that a violation of that clause permits MM & P to cancel the no-strike provisions of the agreement. Thus, the necessary quid pro quo of a no-strike commitment in exchange for binding arbitration, as recognized by the Supreme Court, is not even present here.

For all of the above reasons, we submit that deferral to arbitration of the issues involved in the underlying unfair labor practice case and dismissal of the Section 10(l) injunction proceeding was neither required nor appropriate.

IV. THE INJUNCTIVE RELIEF GRANTED BY THE COURT BELOW WAS JUST AND PROPER

The court below found that MM & P's actions in seeking to arbitrate Seatrain's alleged breach of the "union signatory" clause "would in effect prevent consummation of or substantially interfere with sales of Seatrain's ships (the T/T Brooklyn and T/T Williamsburg) to purchasers who have non-[MM & P] affiliation." (A. 23a). Certainly the arbitral relief sought by MM & P, the manning of the vessels with MM & P licensed deck officers and the payment by Seatrain of the wages and fringe benefits lost so long as the vessels remain manned by other than MM & P personnel, will have a "chilling effect" on any future attempts by Seatrain to dispose of the two other vessels presently under construction. Further, the court below concluded that the unlawful conduct of the MM & P "will likely be repeated or continued unless enjoined" (A. 30a).

The propriety of injunctive relief in Section 10(1) cases turns not upon traditional equity criteria applicable in suits between private parties, but upon necessity for effectuating the statutory policy. Hecht Company v. Bowles, 321 U.S. 321, 331 (1944). Where Congress, as here, sets the standards for the issuance of injunctions (supra, pp. 14-15), those standards and no others need be satisfied to sustain the prayer for injunctive relief. Brown v. Pacific Telephone & Telegraph Co., supra, 218 F. 2d at 544-545; see also Douds v. International Longshoremen's Association, supra, 242 F. 2d at 811; Madden v. International Organization of Masters, Mates and Pilots, supra, 259 F. 2d at 313. Compare Danielson v. Joint Board, supra, 494 F. 2d at 1245, involving a novel

legal theory where the Court was convinced that an enforceable Board order could not be entered. Where, as here, there is reasonable cause to believe that the contract clause at issue is unlawful, an order in the instant case enjoining MM & P from maintaining, giving effect to or enforcing the unlawful clause, whether through arbitration or otherwise, is "just and proper." Cf. McLeod v. A.F.T.R.A., supra, 234 F. Supp. at 840; Retail Clerks Union v. Food Employers Council, Inc., 351 F. 2d 525, 531 (C.A. 9, 1965). Moreover, here it has been demonstrated that there is a practical effect to MM & P's continued reliance on the unlawful clause: interference with the sale or transfer of Seatrain's ships. And, it is settled that Section 10(l) relief is warranted not only to restore ongoing strikes, picketing, or boycotts which have actually disrupted commerce, but also to restrain unfair labor practices which threaten or may tend to disrupt commerce. Solien v. Miscellaneous Drivers and Helpers Union, 440 F. 2d 124, 127 (C.A. 8, 1971), cert. denied 403 U.S. 905; Douds v. International Longshoremen's Association, supra, 242 F. 2d at 812-813; Danielson v. Local 275, Laborers, 479 F. 2d 1033, 1037 (C.A. 2, 1973); Retail, Wholesale & Department Store Union v. Rains, 266 F. 2d 503, 506 (C.A. 5, 1959); Squillacote v. Graphic Arts International Union, Local 277, supra, slip opinion at p. 11.

CONCLUSION

It is respectfully submitted that the court below was warranted in finding reasonable cause to believe that MM & P violated

Section 8(e) of the Act and that injunctive relief was just and proper and that the order of the court below should therefore be affirmed.

Respectfully submitted,

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MARCH, 1975.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7062

SIDNEY DANIELSON, Regional Director
of the Second Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS, AFL-CIO,

Respondent-Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 21, 1975, two copies of Brief for Petitioner-Appellee were duly mailed to each attorney for Respondent-Appellant Marvin Schwartz, 243 Waverly Place, New York, New York 10014 and Waldman & Waldman, 501 Fifth Avenue, New York, New York 10017 in a government franked envelope.

Charles I. Cohen
Supervisory Attorney

Dated at Washington, D. C.
this 21st day of March, 1975.